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NO. 80-1907

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MADALYN MURRAY O'HAIR
AND JON G. MURRAY
Petitioners

V.

LEE COCKE, RICHARD GOODMAN, BETTY HIMMELBLAU, CAROLE McCLELLAN, RON MULLEN, JIMMY SNELL and JOHN TREVINO,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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JUNE 12, 1981

QUESTION PRESENTED

Whether the custom and practice of the City Council of the City of Austin, Texas, of having an invocation at the beginning of City Council meetings violates the establishment clause of the First Amendment.

LIST OF PARTIES

Petitioners are: Madalyn Murray O'Hair and Jon G. Murray.

Respondents are: Lee Cooke, Richard Goodman, Betty Himmelblau, Carole McClellan, Ron Mullen, Jimmy Snell, and John Trevino.

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Jurisdictional Statement

The Petition for a writ of certiorari on pages i-ii thereof alleges five points of error under the subject heading "Questions Presented." This Court does not have jurisdiction to consider the alleged fourth point of error because it was never raised or alleged in any court below. *Hiawassee River Power Co. v. Carolina Tennessee Power Co.*, 252 U.S. 341 (1920). With respect to the third and fifth "Questions Presented", which attack the custom of the United States Court of Appeals for the Fifth Circuit of having a brief ceremonious prayer directly after the Judges enter the Courtroom, the issue was decided adversely to

Petitioners upon ex parte motions presented by Petitioners to this Court and to the United States Court of Appeals. Respondents were never delivered copies of such motions, were never asked to brief the question, and were never asked to respond thereto by this Court, the Court of Appeals, or by Petitioners. Therefore, Respondents urge that "Questions Presented" three and five as set forth in Petitioners' applications for a writ of certiorari are not properly a part of Respondents' case.

Statement of the Case

Petitioners, Madalyn Murray O'Hair and Jon Murray, brought suit against Respondents, members of the City Council of Austin, Texas, challenging the custom and practice of having an invocation at the beginning of City Council meetings. Petitioners and Respondents by stipulation agreed to all material facts. Pursuant to Rule 56, Federal Rules of Civil Procedure, Cross Motions for summary judgment together with briefs were submitted. The United States District Court for the Western District of Texas held that the challenged invocation practice did not violate the establishment clause. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

A copy of the District Court's ORDER appears in the Appendix of Petitioners' Petition For A Writ Of Certiorari. However, due to some error, this copy of the District Court's ORDER omits the tenth fact stipulation and misnumbers the eleventh stipulation as the tenth. The stipulations correctly appear in the District Court's Order of January 29, 1980, as follows:

1. The Plaintiffs are citizens, residents, and taxpayers of Austin, Travis County, Texas.

2. The Defendants are the publicly elected Mayor and members of the City Council of Austin, Travis County, Texas.

3. The Defendants engage in the custom and prac-

tice of having an invocation given at the beginning of most, but not all, of the regularly scheduled meetings of the City Council of the City of Austin.

4. At the meetings at which no invocation is given, the Mayor calls the meeting to order and the Council then proceeds with its business.

5. The regularly scheduled meetings of the Austin City Council are held in the Council Chambers which are located in the City of Austin's Municipal Annex, a building owned and maintained by the City of Austin.

6. The custom and practice of having an invocation at the beginning of most regularly scheduled meetings of the City Council of the City of Austin are not required or provided for in any ordinance, resolution or motion adopted by Defendants or any other City Council of the City of Austin.

7. The City of Austin, at public expense, prepares written agenda for all City Council meetings. Typically, the giving of an invocation will appear at the beginning of a meeting's written agenda in one of the following ways:

INVOCATION

or

INVOCATION—REVEREND HENRY E. BESEDA, AUSTIN BRETHREN CHURCH

A written agenda typically consists of six to ten

letter-sized pages.

8. The City of Austin, at public expense, prepares written minutes of regular meetings of the City Council. Typically, if an invocation is delivered at a Council meeting the minutes will so indicate in the following manner:

INVOCATION

> The invocation was delivered by Reverend John Towery, Congregational Church of Austin

A set of written minutes typically consists of twenty to forty-five letter-sized pages.

9. Although the text of an invocation does not appear on the agenda of meetings or in the minutes of meetings, all Council meetings are taped and, therefore, the full text of an invocation appears on these tapes which are stored in the office of Austin's City Clerk. The tape of a typical City Council meeting is six to twelve hours long.

10. The invocations delivered at the beginning of City Council meetings typically consume less than one minute of time.

11. Invocations delivered at the beginning of City Council meetings are not given by, selected by, prepared or written by, reviewed by, edited by, or typed by Defendants or any other City of Austin employee or official.

12. Currently, the predominant practice followed in obtaining a person to deliver the invocation is that the Austin Council of Churches notifies the City of a local clergyman who will be available.

13. There are no restrictions on who can deliver an invocation and no person has been refused the opportunity to deliver the invocation at a City Council meeting.

14. Defendants have not received any requests from Hindus, Buddhists, Muhammadans, members of the Church of Scientology, or Atheists to present an invocation or ceremony at the beginning of City Council meetings. During the term of the current mayor there have not been any express invitations to give the invocation or ceremony extended to any of the above-mentioned groups.

15. Persons giving the invocation receive no compensation of any kind whatsoever from Defendants, the City of Austin, or the City's employees or officials.

16. Typically the invocation is announced by the Mayor in the following fashion:

"The invocation will be delivered by John Doe," at which time City Council members and most of those persons present stand for the invocation. There is no request made for those present to stand or to do anything else.

17. No person is required to stand or be present during the invocation, and every person present is

completely free to leave before or during the invocation.

18. The custom and practice of having an invocation at the beginning of City Council meetings has been followed for many years in Austin, Texas, and Defendants intend to continue this custom and practice.

19. Invocations given at the beginning of City Council meetings are typically addressed to a Supreme Being.

20. The invocations given at the beginning of City Council meetings are directed toward establishing a solemn atmosphere and serious tone for the City Council meetings.

The Petition For a Writ of Certiorari asserts that Ms. O'Hair has been ordered out of Federal courtrooms and City Council chambers because she refused to pray. Such is not the case. On January 28, 1981, at oral argument in this cause before the United States Court of Appeals for the Fifth Circuit, Ms. O'Hair repeatedly accused the Court of ordering her from the courtroom. Judge Ainsworth found it necessary, more than once, to explain to Ms. O'Hair that she had not been ordered from the courtroom, but instead, for her convenience, had been granted authorization to leave the courtroom during the opening announcement if she so desired. Similarly, Ms. O'Hair, contrary to her statements in her application for a writ of certiorari, has never been ordered to pray in or depart from a City Council meeting. The

criminal charge, referred to on page 8 of her Petition, was not made because she refused to pray or otherwise participate in the opening ceremony, but because she refused to cease disrupting a public meeting.

Summary of Argument

Respondents request that Petitioners' application for a writ of certiorari be denied for three reasons.

First, the decisions of the District Court and the United States Court of Appeals for the Fifth Circuit correctly hold that under the facts of this case, the presentation of an invocation at the opening of a city council meeting does not violate the establishment clause of the Fourteenth Amendment to the United States Constitution because such practice (1) has the clearly secular purpose of establishing a solemn atmosphere and serious tone for city council meetings, (2) has a primary effect which neither advances nor inhibits religion, and (3) avoids excessive government entanglement with religion. The facts stipulated to by Petitioners and Respondents clearly show that the invocation practice followed by the Austin City Council is directed toward establishing a solemn atmosphere and a serious tone for city council meetings. In addition, the stipulated facts establish that the invocation practice of the Austin City Council has a primary effect which neither advances nor inhibits religion, since invocations are extremely brief, are subject to being delivered by anyone, and since no person is required to participate in the invocation proceedings. Finally, the stipulated facts reveal that the invocation practice of the Austin City Council avoids excessive government entanglement with religion in that the City does not write, review, edit, or type any of the invocations and does not provide any

compensation whatsoever to anyone who delivers an invocation. Therefore, the decisions of the District Court and the United States Court of Appeals for the Fifth Circuit do not conflict with applicable decisions of this Court.

Second, the practice of having invocations at the opening of a city council meeting, under the facts of this case, does not present an important question of federal law that should be settled by this Court. Any contact between government and religion in this case is certainly *de minimus*. There is no sponsorship, financial aid to, or active involvement in, religion of a degree which transgresses the establishment clause of the Fourteenth Amendment to the United States Constitution. Therefore, under the facts of this case, no important federal question exists which should be settled by this Court.

Third, the United States Court of Appeals for the Eighth Circuit has decided the issue in this case consistent with the United States Court of Appeals for the Fifth Circuit. In addition, all other court decisions on this same matter are consistent with the decisions in this case.

Argument

I. THE DECISIONS BELOW ARE CORRECT AND DO NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The District Court and the Court of Appeals correctly held that Respondents' invocation practice does not violate the establishment clause. The Supreme Court has established a three-part test for the analysis of establishment clause claims. To be upheld, a law or practice must have a clearly secular purpose; second, must have a primary effect that neither advances nor inhibits religion; and third, must avoid excessive government entanglement with religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 773 (1973).

Respondents' invocation practice has the clearly secular purpose of establishing a solemn atmosphere and serious tone for the City Council meetings. Fact stipulation number twenty (20) establishes that the Respondents' invocation practice is directed toward establishing a solemn atmosphere and serious tone for City Council meetings.

The invocation has a primary effect that neither advances nor inhibits religion. In this case, invocations of less than one minute's duration, which are not selected, prepared or written, reviewed, edited, or typed, by any municipal official or employee, are delivered by individuals of varying religious beliefs at the opening of City Council meetings. There is no

requirement or request made that any person stand or be present during the brief invocation, and every person present is completely free to leave before or during the invocation. No person is excluded from taking his or her turn at delivering the opening ceremony, and no person has ever been refused the opportunity to do so. In addition, there is no compensation flowing from the government to any person delivering an invocation. The described practice does not have the primary effect of advancing any religion over any other religion, does not have the primary effect of advancing religion over nonreligion, and does not inhibit religion.

Respondents' invocation practice, likewise, avoids excessive government entanglement with religion. In this case, there is no financing of religion, no administrative oversight of religion, and no governmental conditions placed on participation in the City's invocation practice. Therefore, the invocation practice in this case does not present the kind of involvement that could tip the balance toward government control of churches or toward governmental restraint on religious practices. *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). Therefore, the invocation practice of the Austin City Council has not and will not result in political divisiveness of the kind that threatens both church and state.

The Supreme Court has never resolved the question of the validity of invocations given at the beginning of government meetings. However, two decisions of this Court have indicated *in dicta* that such practices are not objectionable. See *Zorach v. Clau-*

son, 343 U.S. 306, 312-313 (1952); and *Abington School District v. Schempp*, 374 U.S. 203, 299-300 (1963) (Brennan concurring).

Therefore, although the Supreme Court has never resolved the question presented, application of the Court's three-part test supports the conclusion that the District Court and the Court of Appeals correctly decided the merits of this case.

II. THE PRACTICE OF HAVING INVOCATIONS AT THE OPENING OF A CITY COUNCIL MEETING DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Decisions of this Court establish that the primary evils that the establishment clause was designed to protect against are: (1) sponsorship of religion by government, (2) financial aid to religion by government, and (3) active involvement of government in religion. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). Also, this Court has made it clear that the First Amendment does not require that in every respect and all respects there shall be a separation of Church and State. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). Although the tripartite test of secular purpose, primary effect, and excessive entanglement has been developed by this Court for analyzing government actions

alleged to be in violation of the establishment clause, the Court has stated that this test is to be used as a guideline only, is not to be applied mechanically, but is to be used as an aid in determining whether the action is of such degree as to violate the establishment clause. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975). In this case, the degree of government involvement with religion is clearly *de minimus* and does not result in government sponsorship of religion, government financial aid to religion, or active involvement of government in religion which will lead to a government established religion, to political divisiveness, to persecution of persons, to a degrading of religion, or to the destruction of government. *Engel v. Vitale*, 370 U.S. 421 (1962). Therefore, the decision in this case does not involve an important federal question that should be settled by this Court.

III. THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME MATTER NOR WITH THE DECISION OF A STATE COURT OF LAST RESORT.

The decisions of the District Court and the United States Court of Appeals for the Fifth Circuit are in accord with the decision rendered by the United States Court of Appeals for the Eight Circuit in *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979). Also, there are no decisions of other federal courts of appeal on the same matter which conflict with the decisions in

this case. Likewise, the decisions in this case are consistent with the following United States District Court and state court decisions:

Chambers v. Marsh, 504 F.Supp. 585 (Neb. 1980)

Colo v. Treasurer and Receiver General, ___ Mass. ___, 392 N.E. 2d 1195 (1979)

Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968)

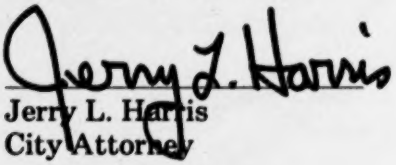
Marsa v. Wernik, 163 N.J. Super. 589, 395 A.2d 530 (Ch. Div. 1978), *aff'd per curium*, 171 N.J. Supr. 587, 410, A.2d 282 (App. Div. 1980, appeal pending)

And, there is no decision of a state court of last resort which is in conflict with the decisions in this case.

Conclusion

Therefore, for the reasons stated, Respondents respectfully request that the writ of certiorari be denied.

Respectfully Submitted,



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Certificate of Service

In accordance with Supreme Court Rules 28.3 and 28.5, I hereby certify that all parties required to be served in this cause have been served by mailing, first-class postage prepaid, six (6) true and correct copies of the foregoing Brief in Opposition, to:

Madalyn Murray O'Hair
Jon G. Murray
The American Atheist Center
P.O. Box 2117
Austin, Texas 78768

on this the 12th day of June, 1981.

Jerry L. Harris
Attorney for Respondents